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FEB 22 2001

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No. 00-1178

# In the Supreme Court of the United States

MICHAEL FINE, ET AL.,

*Petitioners,*

v.

AMERICA ONLINE, INC.,

*Respondent.*

**On Petition for a Writ of Certiorari to the Ohio Supreme Court**

## BRIEF FOR RESPONDENT IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether petitioners, who had actual notice of the Illinois settlement, lack standing to challenge the sufficiency of the settlement notice, and whether their failure to object to the notice in the Illinois courts precludes them from objecting collaterally in the Ohio courts.

2. Whether the Ohio Court of Appeals correctly determined that the scope of collateral review of state court judgments is not de novo, and that the Full Faith and Credit Clause requires deference to rulings on issues that were fully, fairly, and finally litigated in Illinois.

3. Whether the Illinois Circuit Court's fact findings regarding the relative merits of proposed notice mechanisms were correct.

## RULE 29.6 STATEMENT

The respondent is America Online, Inc. ("AOL"). AOL is a wholly owned subsidiary of Time Warner, Inc., which is publicly traded.

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## INTRODUCTION

In February 1998, an Illinois state court approved a settlement between AOL and a nationwide class of its current and former customers. Petitioners are members of the class certified in Illinois, but had also filed a separate class action against AOL in Ohio. In April 1998, the Ohio court held that the Illinois settlement precluded petitioners' Ohio claims. Petitioners tried to avoid the settlement's preclusive effect by collaterally attacking the notice approved by the Illinois court. The Ohio courts rejected this collateral attack because they deemed the procedures employed in Illinois sufficiently fair to produce an outcome consistent with due process. Petitioners now seek certiorari to review Ohio's enforcement of the Illinois settlement. The petition should be denied for several reasons.

First, fact-based defenses unique to petitioners render this case an inappropriate vehicle for addressing broad questions about the scope of collateral review of class action settlements. This is not a case in which a settlement in one state came as surprise to litigants in another state due to deficiencies in the settlement notice. In fact, petitioners cited the Illinois action as a reason for certifying the Ohio action, so that Ohio counsel could participate in the Illinois settlement proceedings. Petitioners' counsel then attended the Illinois fairness hearing where the adequacy of the notice was litigated, but did not raise any of the objections now urged upon collateral review. Because petitioners had actual notice of the settlement, they lack standing to challenge notice; and even if petitioners had standing to complain about the notice, their failure to object in Illinois precludes a collateral attack in Ohio. The petition therefore does not implicate the broad questions it purports to present.

Second, petitioners envision the scope of collateral review to be far broader than this Court has previously allowed. Their theory lacks *any* support, and thus does not implicate a

split in authority or mature question of law warranting certiorari. According to petitioners, a reviewing court should relitigate de novo each contested factual and legal conclusion reached by the rendering court. Petitioners contend that what the Ohio courts did here – verify that the Illinois court's procedures were sufficiently fair to produce an appropriate outcome – was inadequate. However, settled authority supports the Ohio court's methodology, no authority supports petitioners' alternative theory, and petitioners' proposal would render collateral attacks far more invasive than the Full Faith and Credit Clause permits. There is no reason for the Court to adopt the rule petitioners propose, and no reason even to address the question.

Finally, the sufficiency of notice in this case is a question of fact. AOL does not contest petitioners' summary of controlling due process principles. Instead, AOL and petitioners dispute the application of settled doctrine to contested facts about the relative merits of various proposed notice mechanisms. The Illinois court resolved fact questions in favor of AOL, and the Ohio courts found no deficiencies in the Illinois court's procedures. Petitioners continue to cling to their version of the facts, but their persistence does not raise a substantial question warranting this Court's review.

## STATEMENT

### A. Background

AOL is an online service provider, offering services and content such as news, entertainment, e-mail, and internet access to members who electronically connect to its network through their computers. This case arises from allegations that members had difficulty connecting to AOL after it began offering its services for a flat fee, rather than an hourly fee.

AOL initially charged a monthly fee that entitled

members to a specified number of hours online. Additional hours of access required an additional hourly fee. In December 1996, AOL adopted flat fee pricing, such that customers paid a fixed fee regardless of how many hours they spent online. Some customers complained that the new pricing regime increased demand for AOL's services, causing congestion and occasional difficulty accessing AOL's network. Almost immediately, numerous class actions were filed against AOL across the nation. The gist of plaintiffs' claims was that AOL committed fraud and breached its contracts by promising a level of service that it could not provide in light of the demand generated by the promise.

**B. Illinois Proceedings**

AOL eventually settled a nationwide class action in the Circuit Court of Cook County, Illinois, in February 1998. *See Schwab v. America Online, Inc.*, No. 96 CH 13732 (reprinted as Pet'n App. C). The settlement provided refunds or credits to consumers based on their particular service plan and the amount of time they used the network. App. 26a-28a. The settlement incorporated and expanded a prior agreement that AOL had reached with 45 State Attorneys General. App. 26a.

The Illinois court approved the settlement after conducting a fairness hearing. App. 23a. The court found that plaintiffs would "have a difficult time proving that AOL engaged in a deceptive act" because AOL had been "forthright" by "informing its members of the expected surge in demand." App. 31a. In addition, the court found that plaintiffs "would have difficulty proving damages" because, notwithstanding network congestion, the average AOL member had more than doubled his use of the system during the contested time period. *Id.* The court also noted that plaintiffs' contract claim had "fatal" defects and that AOL had "meritorious defenses." App. 31a-33a. The court concluded that the settlement was

reasonable in light of these factors. *Id.*

The court approved notice of the settlement in three forms: direct mail, publication, and online postings. The direct mail notice went to former AOL customers, and is not challenged in the petition. The publication notice appeared in the *New York Times*, *Wall Street Journal*, *Chicago Tribune*, *Los Angeles Times*, and *USA Today*. App. 37a. The petition does not directly attack the publication notice, but does contend that such notice alone would have been insufficient with respect to current AOL customers. Pet'n 14.

The remaining form of notice – online postings – is the subject of the petition. AOL provided online notice to its current members in three ways. First, AOL posted a message on its "Welcome Screen" that "inform[ed] members of the pending class action and the settlement terms." App. 38a. The welcome screen is the greeting that appears each time an AOL member logs on to the network. *Id.* Clicking on the welcome screen message led members to the full text of the settlement notice. *Id.*

Second, AOL posted the settlement notice on its "Member Services" screen. *Id.* Members are "contractually obligated" to "periodically" check this screen, which was viewed more than 51 million times between May and November of 1997. *Id.* Third, AOL posted the settlement notice in a "free area of AOL and on the Internet." *Id.*

The Illinois circuit court found that "[t]he means of notice employed in this case were reasonably certain to inform those affected of the nature of the action, the terms of the settlement, and how to make a claim or objection, or altogether opt-out." *Id.* In particular, the court found that "the use of the online service itself in the form of the Welcome Screen, Member Services Screen, and the free area of AOL, is more effective than sending individual notices by mail" because the

online postings gave members "multiple notices" of the settlement. App. 39a.

The Illinois court also addressed objections to notice by "[s]everal attorneys representing members of the class in litigation against AOL before other courts." App. 34a. Some objectors argued that direct mail or e-mail notice to each class member would have been superior to online posting. App. 35a. The court explicitly rejected these objections, identifying factual problems with both mail and e-mail notice. The court found that mail notice would have been less effective than online postings, and that e-mail notice might not have been feasible and could have been blocked by members, such that "there is no guarantee that all members would obtain the e-mail message, even if AOL had the capacity to send a member-wide e-mail." App. 39a.

The circuit court found that "[u]nder such circumstances" the settlement notice "satisfied the requirements of due process." *Id.* It is undisputed that counsel for the Ohio class attended the Illinois fairness hearing, but did not object to the settlement notice. App. 17a. There was no appeal from the court's order approving the settlement and the notice.

### C. Ohio Proceedings

During the pendency of the *Schwab* case in Illinois, petitioners Michael Fine, Rodney Lang, and Dan Rambo filed a similar class action against AOL in the Court of Common Pleas of Lorain County, Ohio. The Ohio court certified an Ohio-only class two weeks after the complaint was filed. All three petitioners, and those whom they represent, are also members of the *Schwab* class certified in Illinois.

After the *Schwab* settlement became final, AOL moved for summary judgment in the *Fine* case on the ground that the Illinois settlement precluded the Ohio action. The trial court

agreed, and entered judgment for AOL. Petitioners then appealed to the Ohio Court of Appeals.

The Court of Appeals affirmed the trial court's grant of summary judgment for AOL. App. 4a. The court first determined that under the Full Faith and Credit Clause, the Ohio courts were obligated to give the *Schwab* settlement the same preclusive effect that the settlement would receive in Illinois. App. 8a-9a. Next, the court applied Illinois' law of preclusion and determined that the *Schwab* settlement did in fact preclude petitioners' claims. App. 9a-10a. Finally, the court recognized that under the Full Faith and Credit Clause, Ohio may enforce judgments from other states only if those judgments comply with due process. App. 10a-11a. The court held that review of the *Schwab* settlement's consistency with due process did not entail de novo reconsideration of the decision. App. 12a-14a. Instead, the court reviewed the "procedural safeguards" employed in Illinois to determine if these were sufficient to produce an outcome consistent with due process. App. 12a-13a, 16a. The court reasoned that:

> Traditionally, grounds which may be invoked to advance collateral attacks are much more limited than those that may be sustained as error on direct appeal. To hold otherwise would create a form of collateral review that is inconsistent with both the spirit of the class-action mechanism and the principles at the very core of the full faith and credit doctrine.

App. 13a (footnote omitted).

The court applied these principles of collateral review to the *Schwab* ruling on notice and concluded that the Illinois court's "findings demonstrate both the presence and application of procedural safeguards." App. 17a. The Ohio court found that the Illinois court had "broad discretion" to select the most

appropriate form of notice, and had exercised that discretion diligently. App. 16a-17a. The court also concluded that petitioners' collateral attack was "precluded" because "counsel for the Ohio class attended the fairness hearing in the *Schwab* matter, yet failed to raise the objections they attempt to raise now." App. 17a. One judge dissented on the grounds that the on-line posting was insufficiently attention-grabbing to constitute adequate notice. App. 22a.

The Court of Appeals also rejected petitioners' claim that the class representatives and class counsel in the Illinois action were inadequate. App. 17a-19a. In this Court, petitioners have abandoned their challenge to the adequacy of representation.

Petitioners sought review of the Court of Appeals decision in the Supreme Court of Ohio. The court dismissed the appeal because the case did not involve "any substantial constitutional question." App. 1a. Three justices dissented from the denial of review without opinion.

## REASONS FOR DENYING THE PETITION

### I. Standing And Waiver Defenses Render This Case An Inappropriate Vehicle For Addressing General Principles Governing Collateral Review Of Class Action Settlements

The rhetoric in the petition implies that petitioners were shocked to discover that the Illinois action had extinguished their Ohio claims and were therefore aggrieved by alleged deficiencies in the Illinois notice. But the petition omits two critical facts. First, petitioners' counsel was present at the Illinois fairness hearing, and did not object to the notice. App. 6a, 17a. Second, petitioners knew of the Illinois action even before the Ohio action was certified. In fact, petitioners cited the Illinois case as a basis for certifying the Ohio case, with the

goal of enabling their counsel to participate in the Illinois settlement proceedings on behalf of Ohio consumers. *See* Tr. 2/6/97 Certif. Hr'g, at 8, 12, 24.[1]

Petitioners cannot claim to have been harmed by the allegedly insufficient notice of the Illinois action because they knew about it all along. This actual notice of the Illinois action deprives petitioners of standing to contest the notice procedures. *See Lyng v. Payne*, 476 U.S. 926, 937 (1986) (representative of class challenging Department of Agriculture's failure to provide farmers with adequate notice of loan program lacked standing because he had "actual notice" of the program despite the alleged misconduct); *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992) (litigant lacks standing to contest violations of another person's rights when his own circumstances do not support a claim).

Moreover, as the Ohio Court of Appeals held, petitioners' failure to object in Illinois – either in the circuit

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[1] The named petitioners (Fine, Long, and Rambo) have not denied receiving actual notice of the Illinois settlement. The only evidence in the record regarding whether any particular Ohio class member received notice is the affidavit of plaintiff Ronald Koshar, who admitted that he saw the welcome screen notice multiple times, clicked on it, realized that it pertained to a settlement in Illinois, but elected not to read it. *See* Koshar Aff. (ex. 3 to Pls.'s Mem. in Opp'n to Summ. Judg.) at ¶¶ 8-9. Petitioners have not explained why AOL can be blamed for a class member's conscious decision not to read a plainly visible notice that would have informed him of his rights if he had read it. *Cf. Peters v. National R.R. Passenger Corp.*, 966 F.2d 1483, 1486 (D.C. Cir. 1992) ("the proper inquiry" is whether notice was given, not whether it was received, because "the due process clause does not amount to a guarantee of notice to a class member").

court or by direct appeal[2] – forfeits their right to launch a collateral attack on the Illinois judgment in Ohio. *See, e.g.*, *Underwriters*, 455 U.S. at 709 n.16 ("Having failed" to raise its objections in the rendering court, a party's "only recourse is to assert these legal arguments on direct review . . . it cannot raise these contentions in a collateral attack on the judgment").

Accordingly, even if the petition addressed questions that in theory warranted review, AOL's unique defenses would preclude consideration of those questions in this case. Resolution of issues relating to the scope of collateral review or the adequacy of settlement notice should await a case in which the petitioner actually lacked notice. Here, petitioners knew all along exactly what was happening to their claims and have tried to manipulate the courts by litigating questions in Ohio that they should have – and could have – litigated in Illinois. The petition is therefore an inappropriate vehicle for the issues it purports to raise.

## II. The Ohio Courts Correctly Refused To Relitigate Questions That Had Been Fully, Fairly, And Finally Resolved In Illinois

AOL and petitioners agree on two basic principles. First, the Full Faith and Credit Clause requires the courts of one state to enforce judgments from another state. *See* U.S. Const.

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[2] The Illinois circuit court permitted lawyers representing class members from other states to participate in the fairness hearing. App. 34a. Illinois law would also have permitted petitioners to intervene in the *Schwab* action and contest the settlement notice on direct appeal. *See, e.g.*, *Fox v. Northwest Ins. Brokers, Inc.*, 446 N.E.2d 1260, 1262-63 (Ill. App. 1983) (appellate court invalidated class action settlement notice based on arguments of intervening absent class member). Petitioners did not attempt to intervene or appeal and thus failed to exhaust their remedies in Illinois before seeking collateral review in Ohio.

art. IV, § 1. Second, an exception to this duty of enforcement arises when the rendering court's judgment violates the Due Process Clause. Pet'n 15-16.

The disputed question is how a court should decide whether the judgment it is being asked to enforce offends due process. According to petitioners, the Due Process Clause requires a reviewing court to reconsider de novo each factual and legal issue initially decided by the rendering court. Thus, in petitioners' view, the Ohio court should have reweighed evidence presented in Illinois about the adequacy of different proposed notice mechanisms and the content of the notice, and then considered anew the same legal arguments that the Illinois court had rejected. Pet'n 15-17. Petitioners characterize the Ohio court's refusal to second-guess the Illinois court in this manner as a "rubber-stamp." Pet'n 17.

Petitioners have not cited a single case that endorses this relitigation theory of collateral review. The petition cites only four cases in this section of its argument, none of which relate to the *scope* of collateral review. Pet'n 15-17. The cited cases merely confirm that collateral attacks can be based on due process grounds, *see Griffin v. Griffin*, 327 U.S. 220, 228 (1946); *In re Real Estate Title & Settlement Servs. Antitrust Litig.*, 869 F.2d 760, 769 (3d Cir. 1989); *Battle v. Liberty Nat'l Life Ins. Co.*, 770 F. Supp. 1499, 1512-13 (N.D. Ala. 1991), and that due process requires adequate notice, *see Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985). Petitioners have failed to cite any case that requires a court in one state to relitigate fact questions that were fully and fairly litigated in another state.

The dearth of authority in the petition is not surprising, because it is settled that the scope of collateral review is narrower than the scope of review on direct appeal. This Court has held repeatedly that issues "fully and fairly" litigated in the

rendering court are entitled to full faith and credit regardless of whether the reviewing court would have reached the same result. *See, e.g., Underwriters Nat'l Assurance Co. v. North Carolina Life & Accident Health Ins. Guar. Ass'n*, 455 U.S. 691, 709 n.16 (1982) ("As we have consistently held, the fact that the rendering court may have made an error of law with respect to a particular question does not deprive its decision of the right to full faith and credit, so long as that court fully and fairly considered" the question); *id.* at 706-07 ("scope of review" in the second court is "limited" because questions that are "fully considered and finally determined" are "entitled to full faith and credit"); *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 481 (1982) ("state proceedings need do no more than satisfy the minimum procedural requirements of the Fourteenth Amendment's Due Process Clause in order to qualify for the full faith and credit guaranteed by federal law"); *Durfee v. Duke*, 375 U.S. 106, 111 (1963) (noting "general rule that a judgment is entitled to full faith and credit – even as to questions of jurisdiction – when the second court's inquiry discloses that [disputed] questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment").

The limited scope of collateral review is sensible because otherwise the principles of comity and finality animating the Full Faith and Credit Clause would be hollow, and settlements could not be relied upon to terminate litigation. *See, e.g., Underwriters*, 455 U.S. at 704 (limited scope of collateral review under Full Faith and Credit Clause guards against "risk of relitigation"); *Baldwin v. Iowa State Traveling Men's Ass'n*, 283 U.S. 522, 524 (1931) (Due Process Clause does not create a "right to litigate the same question twice" in violation of full faith and credit principles). Here, it is clear that the Illinois court fully, fairly, and finally resolved the notice question after carefully considering and responding to

objections. Under settled precedent from this Court, the Illinois court's decision must be given full faith and credit.

Petitioners ignore the foregoing precedent entirely, and do not propose any way of reconciling existing authority with their novel theory of collateral review. The petition's *ipse dixit* interpretation of the Due Process Clause has no support and no merit, and there is no reason for the Court to entertain it.

## III. The Relative Merit Of Competing Notice Proposals Raises Questions Of Fact That Do Not Warrant Review By This Court

The petition attacks the adequacy of the settlement notice on three grounds. These attacks rest entirely on factual disputes that do not warrant this Court's attention.

First, the petition contends that online notice was insufficient because notice by e-mail or direct mail would have been more effective. Pet'n 14. The Illinois court considered and rejected precisely this claim, finding as a matter of fact that the online notice was "more effective than sending individual notices by mail" or e-mail. App. 39a. The petition does not even mention this finding, let alone respond to it. Petitioners also fail to identify any authority challenging the common-sense conclusion that notice to a class of computer users is sufficient when it places a message on the opening screen of each class member when that person accesses the defendant's computer network. *See generally Shutts*, 472 U.S. at 812 (notice must be the "best practicable").[3]

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[3] In fact, the record shows that the welcome screen was an appropriate means of distributing notice. AOL members see this screen when they log on, and its prominence is confirmed by the fact that businesses pay more to advertise on it than anywhere else within AOL. *See* Aff. of Randall Boe, at ¶ 5 (attached to AOL's Reply in Supp. of Summ. Judg.). Posting notice on the welcome screen thus

Second, the petition contends that the welcome screen notice was insufficiently prominent because it was "buried among various advertisements and announcements." Pet'n 13. Petitioners have not attached the notice and have not cited anything in the record to substantiate their characterization of it. Nor can they reconcile their assertion that the notice was "buried" with the Illinois court's finding that it was "reasonably certain to inform" class members of the action. App. 38a. Petitioners merely cite general principles of due process that AOL does not contest. Pet'n 12-15. The only dispute here is factual, and it is not even clear what the dispute is.

Finally, the petition contends that the content of the notice was inadequate because it did not "explain how the national settlement might affect the rights asserted on behalf of Ohio subscribers in this action." Pet'n 15. Once again, it is impossible to evaluate this claim because the notice is not attached to the petition, nor does the petition quote the language with which it disagrees. Moreover, petitioners do not propose any alternative language, nor do they cite any authority requiring the language they assert was omitted.[4] In any event,

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combines the best elements of publication and direct mail by achieving repeated targeted deliveries of a conspicuous message. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections").

[4] Petitioners also mischaracterize the notice, which clearly did inform class members that the settlement would preclude other class actions, such as the Ohio action. The notice stated:

> Other actions, including other class actions, have been brought by other plaintiffs alleging claims on behalf of subscribers of AOL. To the extent that such other plaintiffs are members of the Class defined herein, and

the petition clearly raises a question of fact, and cites no law that AOL contests. The Illinois circuit court held a hearing at which it reviewed and approved the content of the notice after considering all objections and acknowledging the controlling legal principles. App. 35a-39a. Petitioners' preference for a different result does not create a substantial federal constitutional question warranting review by this Court.

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> such persons do not validly exclude themselves from the Class, the Settlement and the release to be given under the Settlement will preclude those persons from continuing to pursue those other actions against AOL and the Released Parties.

Boe Aff., *supra* note 3, at ¶ 7.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 21, 2001